(9)

No. 03-725

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENT

The government asks this Court to read the wire fraud statute as both authorizing criminal prosecutions of U.S. citizens for failure to pay foreign taxes and granting to the Executive the sole and unreviewable discretion as to whether such laws violate this country's public policies. The government thus asserts that by a statute enacted in 1952—when the nation's primary foreign policy concern was not international terrorism, but the spread of Communism—Congress incorporated wholesale into the criminal law of the United States the regulatory and redistributive tax polices of every foreign nation on Earth. Moreover, Congress saw fit to enact this radical departure from western legal tradition *sub silentio*, leaving courts to infer it from the general language of a fraud statute. This reading of the statute defies this Court's precedents, the common law background, the basic principles of statutory interpretation, and common sense.

A. The Government Misconstrues The Scope Of The Revenue Rule.

The government does not dispute that the revenue rule is an established part of the common law against which the wire fraud statute must be interpreted. Instead it presents a narrow construction of the rule rendering it inapplicable in principle to any domestic criminal prosecution, regardless of how pervasively that prosecution depends upon and implements foreign revenue laws. The government presents the revenue rule as consisting of a "core principle" that "prevents a foreign sovereign from filing suit in this country to recover money due under its tax laws." Opp. 12. It then goes on to depict this "core principle" as having birthed two "ancillary principles," which bar certain other suits if they meet two technical criteria: (1) they are brought by a foreign sovereign or someone acting "on its behalf," and (2) their "object" is to vindicate a foreign sovereign's interest in collecting tax revenue. Opp. 15. Based on its construction of the revenue rule, the government asserts that a domestic criminal prosecution involves

neither the "core" nor the "ancillary" principles, and is therefore outside the rule's scope altogether.

The government's construction of the revenue rule is backward, taking the facts of selected cases to define the boundaries of the doctrine, while ignoring the history and the stated principles behind those cases—indeed, labeling any attempt to apply those principles to new facts as an illegitimate attempt at "expansion based on policy considerations." Opp. 27. Contrary to the government's depiction, the revenue rule is not a narrowly technical rule aimed only at preventing a particular means of tax collection.[1] It deals with one of the most basic jurisprudential issues arising from the existence of competing sovereigns within the rule of law: the extent to which the courts of one sovereign will recognize and implement the public policies of another.

Contrary to the government's ahistorical view, the "core" of the revenue rule was never "prevent[ing] a foreign sovereign from filing suit in this country to recover money due under its tax laws." Opp. 12.[2] *Boucher v. Lawson*, 95 Eng. Rep. 53 (K.B. 1734), which is generally regarded as the earliest application of the "revenue rule," involved neither a suit on behalf of a foreign sovereign, nor any attempt to collect tax revenue at all.[3] In fact, the reasoning of the opinion itself did not even single out revenue laws for special treatment. Instead, Lord Hardwicke invoked a broader principle: that "the

[1] Indeed, the government's construction renders the point of the rule unintelligible. If uncollected tax revenues are, as the government argues, merely a form of property like any other, why would the courts of one sovereign begrudge another the right to recover such property?

[2] Such cases actually did not arise until relatively late in the revenue rule's history, when they were recognized as clear—though unprecedented—violations of the rule. *See* Pet. Br. 24 n. 26.

[3] The issue in *Boucher* was whether a shipowner could refuse to deliver up a shipment of gold entrusted to him by plaintiff on the ground that the gold's exportation from Portugal violated that country's laws. *See* 95 Eng. Rep. at 53.

right of an English subject cannot be altered by the general law of any other country, unless there has been a particular determination in his case."[4] In the absence of any such determination by the foreign sovereign, Lord Hardwicke declined to apply the foreign law in the first instance himself. *Id.* at 55-56.

The basic principle behind the revenue rule is thus neither thwarting tax collection nor promoting commerce, but cabining the extraterritorial effect of the public policy choices made by foreign sovereigns. Like the rule against enforcement of foreign penal laws (hereinafter, "the penal rule"), the revenue rule saves domestic courts from the dilemma of either serving as passive vehicles for another sovereign's policies, or being forced to pass judgment on those policies. Restatement (Third) of Foreign Relations Law of the United States ("Restatement"), § 443, Reporters' Note 10 (1986).

In order to buttress its contention that only suits brought by foreign governments or "on their behalf" implicate the rule, the government attempts to dismiss as irrelevant *Boucher*, *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775), and other cases involving enforcement of private contracts either requiring or assuming a violation of foreign revenue law. Opp. 16-17 n.5. Contrary to the government's suggestion, these cases were not repudiated. The court in *Foster v. Driscoll*, [1929] 1 K.B. 470, 518-19 (Eng. C.A.), regarded *Holman* as binding and did not apply it in that case because U.S. prohibition laws were not, properly speaking, revenue laws.[5] The various Lords who had the last word in *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] A.C. 301 (Eng. H.L.), followed suit, distinguishing *Holman* rather than accepting the

[4] 95 Eng. Rep. at 55 (Lee, J.). This was Justice Lee's restatement of the principle discussed at greater length by Lord Hardwicke.

[5] *See* [1929] 1 K.B at 518-19 (law in question "was no mere revenue law; it was intended to prevent a malum in se rather than a malum prohibitum").

lower court's invitation to do away with it.[6] Thus the government's statement that "there is no firmly established common law rule governing such cases," Opp. 17 n.5, is inaccurate.[7] Certainly, at the time the wire fraud statute was enacted, it remained "firmly established" that evasion of foreign revenue obligations would not invalidate a contract, regardless of whether a foreign state was party to the suit or stood to gain tax revenue from its outcome.[8]

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[6] *See* [1958] A.C. at 322-23 (Viscount Simonds) (cases relating to breach of revenue law "not germane" to this case); *id.* at 324 (Lord Reid) (stating that law at issue was not a revenue law, and expressly leaving any reexamination of the revenue rule cases for some future date); *id.* at 328 (Lord Keith) (stating that revenue rule could not "be invoked in the circumstances of this case"); *id.* at 329 (Lord Somervell) (distinguishing *Holman*, which left open the possibility that "the law of one country would take notice of illegalities arising under the laws of another country other than revenue laws").

[7] Even if one looks beyond the enactment of the wire fraud statute in 1952, the government has cited only one case—decided in Singapore in 1994—that expressly takes the step of invalidating a contract based on violation of something the court recognizes as a revenue law. *See Bhagwandas v. Brooks Exim Pte Ltd.*, [1994] 2 Sing. L. Rep. 431, 438 (Sing. H.Ct.) (disagreeing with a case from 1980 that depicted *Foster* as having taken this step) ("With the utmost respect, *Foster* was not a case involving foreign revenue law."). As for *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629 (Tex. App. 1993), the violation there was shipping feed into Mexico without a permit, not evasion of revenue law. *See id.* at 639.

[8] Nor at that time had any court even voiced doubt that the rule would apply to an action that required a domestic court to calculate a foreign tax in the first instance or that inflicted punishment based on the failure to pay such a tax. Indeed, the government has identified no case prior to *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), in which an Executive criminally prosecuted its own citizens for evasion of another country's revenue laws. Significantly, cases dealing with contracts made in violation of foreign law raise unique difficulties not at issue in this case, as enforcement of a promise to violate a foreign sovereign's law can be seen as rendering the court an active participant in the violation.

The government treats *Peter Buchanan Ltd. v. McVey*[9] as standing for the proposition that a lawsuit is barred by the revenue rule if—and only if—"the entire object of the suit is to recover taxes for the foreign government." Opp. 14. In so doing, the government confuses the facts of this case with the principle animating it. The court in *Peter Buchanan* refused to enforce the claim before it, not because the particular *remedy* requested would result in the recovery of tax monies, but because the *right* being asserted amounted to a foreign government's right to have its revenue laws executed. [1995] A.C. at 527. Execution of another sovereign's revenue laws—whether directly or indirectly, through recovery of taxes or punishment of those who fail to pay them—involves a court in the furtherance of essentially arbitrary policies that "are the offspring of political considerations and political necessity." *Id.* at 529. Such laws may pursue "social policies and ideals dangerous to the security of adjacent countries," and rather than attempt to make distinctions between the policies of various states, the court regarded "universal rejection" as the only safe course. *Id.* The principles behind the revenue rule are the same regardless of the form that enforcement of a foreign revenue law takes. The government cannot rely on the unprecedented nature of its actions to argue that they are outside the scope of the rule.[10]

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[9] [1995] A.C. 516 (Ir. H. Ct. 1950), *aff'd*, [1995] A.C. 530 (Ir. Sup. Ct. 1951).

[10] In a related context, this Court has stated that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Lanier*, 520 U.S. at 271 (citations and internal quotation marks omitted).

B. The Prosecution In This Case Manifestly Enforces Canadian Revenue Law.

There is no doubt that if a foreign nation or private party brought suit in this country attempting to enjoin or penalize someone based on violation of foreign tax laws, such suit would be barred by the revenue rule.[11] The government is therefore incorrect when it asserts that this prosecution "does not provide a foreign government with an indirect route to achieve indirectly what it is forbidden from achieving directly by the revenue rule." Opp. 16. Moreover, the government's position that its prosecution of Petitioners for wire fraud does not enforce Canadian revenue law defies common sense. If the government's reasoning were correct, it would follow that when a U.S. citizen refuses to pay U.S. income taxes, and is put in jail for his refusal, this does not, *even indirectly*, enforce U.S. revenue law.

The government asserts that this prosecution does not enforce Canadian law, because its "object" is only to enforce U.S. law. If this sort of subjective characterization of intent were dispositive, then there would be no basis for disallowing RICO suits brought by foreign sovereigns to recover tax revenue. Such sovereigns could also assert that their only "object" was to recover damages for violation of their rights pursuant to U.S. law.[12] In fact, the government has no interest

[11] *See* Pet. Br. 16-17 (discussing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)); Pet. Br. 25 n.28 (citing *Oklahoma ex. rel. West v. Gulf, Colorado & Santa Fe Ry. Co.*, 220 U.S. 290 (1911)).

[12] *See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 131 & n.39 (2d Cir. 2001) (noting but rejecting Canada's arguments "that this is an action brought solely under United States law, and not a claim for Canadian taxes," and stating that "we do not understand how a formalistic distinction between an action based explicitly and entirely on Canadian law and one which, in effect, pleads violations of Canadian law through the medium of a United States statute, is a response to the concerns outlined above about, *inter alia*, judicial non-interference with international tax policy-making by the political branches."), *cert. denied*, 537 U.S. 1000 (2000).

in this case that is separable from its enforcement of Canadian revenue law. Its interest in "preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises," *id.*, is implicated here only if someone was in fact defrauded out of "money or property." *See* Pet. Br. 35-44; *infra* at 9-12. The purpose of the wire fraud statute is to prevent such frauds, not merely to protect the integrity of the U.S. wires. *See* Pet. Br. 30-31. Absent the district court's application in the first instance of Canadian revenue law, there would be no basis for finding the "property" interest alleged in this case to exist.[13] Nor is there any "object" of the government's action that does not "vindicate the foreign sovereign's interest in collecting tax revenue." Opp. 15. The primary objects of criminal punishment are "retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). Here, the level of retribution was calibrated using Canadian tax law, and any deterrent effect is clearly focused on persons in this country who might be inclined to attempt evasion of Canadian taxes. If incarcerating one who thwarts your interests does not "vindicate" them, it is difficult to imagine what does.[14]

C. The Policies Underlying The Revenue Rule Still Hold Force Today.

The government acknowledges "separation-of-powers and judicial competence rationales for the revenue rule," but re-

[13] By contrast, the foreign tax obligations of which the court took notice in *Peter Buchanan* had been assessed and confirmed on appeal by a court of the country imposing them. [1955] A.C. at 519.

[14] Even if tax recovery *per se* were the ultimate concern, the Mandatory Victims Restitution Act, which the Executive Branch has nullified in this case, provides for full restitution and gives victims numerous rights, including the right to receive notice and an opportunity to be heard, 18 U.S.C. § 3664(d)(1) & (2), and the right to receive an abstract of judgment, which, following certain ministerial procedures, "shall be a lien on the property of the defendant. . . ." *Id.* at § 3664(m)(1)(B). Thus, in a wire fraud prosecution, tax recovery should properly be regarded as an "object" of the action.

gards them as insignificant. Opp. 22-27. Despite the government's expansive views of executive power, the Executive Branch does not have the power to make law or the power to say what the law is. Therefore, the exercise of prosecutorial discretion cannot eliminate the significant separation-of-powers issues in this case. Pet. Br. 45; *infra* at 15-20.

Nor is the government correct in minimizing the significant problems of institutional competence that its view of the law—in which U.S. courts do not merely enforce foreign tax judgments but apply foreign tax law in the first instance themselves—would create. Federal judges have neither the training nor the accountability to act as foreign tax assessors, and in the absence of clear direction from Congress have no office to engage in such a pursuit. As a federal procedural rule, the existence of Federal Rule of Criminal Procedure 26.1, which governs how foreign law is to be proved in U.S. courts, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. This rule therefore cannot justify a more expansive view of the wire fraud statute or less robust view of the revenue rule. In any event, the fact that this rule does not make U.S. institutions able to resolve foreign tax questions fairly or correctly is well illustrated in this very case where the government failed to give notice that it intended to prove foreign law, as required by the rule, but obtained a conviction anyway, and where the government itself, despite its vast resources and expertise, has demonstrated just how difficult it is to know what foreign law is. *Compare* Opp. 17-18 (discussing *Regazzoni v. K.C. Sethia*, [1956] 2 Q.B. 490), *with supra* at 3-4 (discussing *Regazzoni v. K.C. Sethia (1944)* Ltd., [1958] A.C. 301 (Eng. H.L.)).

D. The Government Misconstrues The Scope Of The Wire Fraud Statute.

The government argues that the wire fraud statute applies to schemes relating to foreign taxes because (1) tax schemes are within the scope of the wire fraud statute, and (2) foreign

entities may be victims of frauds punishable under that statute. Opp. 10-11. Because the revenue rule is a background rule relating specifically to foreign tax laws, even if the government were correct about these points, it would not follow that foreign tax offenses fall within the scope of the wire fraud statute. In any event, the government's arguments regarding the reach of the wire fraud statute into both tax offenses and foreign conduct are mistaken.

1. Tax Schemes Generally Fall Outside The Scope Of The Wire Fraud Statute.

Interests that a governmental entity may have in its revenue collection role do not fit within the meaning of the term "money or property" as that term has been interpreted in the context of the mail and wire fraud statutes.[15] As Judge Weinfeld observed thirty years ago, use of these provisions has generally been confined to "schemes of a type designed to defraud members of the community at large, in the sale of commodities and services, rather than schemes to defraud the government." *United States v. Henderson*, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974) (mail fraud statute did not reach a scheme to defraud the Internal Revenue Service in the collection of income taxes).[16]

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[15] Although the government recognizes this Court's rulings regarding the "money or property" element of wire fraud, Opp. 28, it appears to argue that those holdings should be disregarded. Opp. 9, 10, 12. This Court rejected an identical argument in *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000); *see also McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Carpenter v. United States*, 484 U.S. 19, 25 (1987). The government provides no reason why principles of *stare decisis* should be abandoned.

[16] *See also Henderson*, 386 F. Supp. at 1035 n.18 ("The few cases in which schemes to defraud governmental units have been held to constitute schemes to defraud within the meaning of the mail fraud provision have involved the purchase or sale by the government of commodities or services."); *United States v. Griffin*, 324 F.3d 330, 353-55 (5th Cir. 2003) (tax credits not "property" under wire fraud statute); *United States v. Por-*

Despite the government's protestation to the contrary, Opp. 37 n.10, the Executive Branch itself has expressed the view that such prosecutions go beyond the proper scope of the mail and wire fraud statutes. *See* U.S. Attorney's Manual § 6-4.210 (2004) (stating "the position of the Tax Division" that "*Congress intended* that tax crimes be charged as tax crimes" and that charging a tax offense as a mail fraud violation "could be viewed as *circumventing Congressional intent* unless unique circumstances are present justifying the use of a mail fraud charge.") (emphasis added) (citing *Henderson*, 386 F. Supp. at 1052-53).

The government points to a handful of cases decided prior to this Court's decision in *Cleveland* in which courts have allowed mail or wire fraud prosecutions based on non-payment of state or federal taxes. Opp. 10-11, 30. These cases are not useful for determining whether a government's interest in uncollected taxes qualifies as "money or property" as that term is now understood. Indeed, many of these cases predate *McNally* and incorrectly held that frauds made punishable by these provisions need not involve "money or property."[17]

Porcelli, 865 F.2d 1352, 1367-70 (2d Cir. 1989) (Newman, J., dissenting) (disapproving prosecution involving unpaid state sales tax because state suffered no deprivation of property).

[17] *See United States v. Melvin*, 544 F.2d 767, 773 (5th Cir. 1977); *United States v. Mirabile*, 503 F.2d 1065, 1066 (8th Cir. 1974); and *United States v. Brewer*, 528 F.2d 492, 494-95 (4th Cir. 1975). The later case, *United States v. Goulding*, 26 F.3d 656, 658-60 (7th Cir. 1994), involved a prosecution against attorneys in connection with a fraudulent tax shelter scheme, which was aimed at obtaining money or property from clients. *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), is a pre-*Cleveland* decision, which is inconsistent with the government's position in this case in that Mrs. Helmsley was convicted of mail fraud even though the government failed to prove that any taxes were due to the state of New York. *Id.* at 93-94. *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987), supports Petitioners because in that case, a wire fraud conviction was *reversed* on grounds that the government held no "property" interest

The government's only post-*Cleveland* case is *Fountain v. United States*, 357 F.3d 250 (2d Cir. 2004), *cert. pending*, No. 04-294, which adopted the same flawed reasoning that the government proposes in this case, disregarding factors relating to the "property" determination that *Cleveland* had identified as significant, including whether the government's interest is transferable and whether the interest at issue is regulatory or proprietary.

Cleveland nowhere stated that in prosecutions based on tax offenses the prosecution did not have to establish the existence of a traditional property interest in the hands of the government. Rather, *Cleveland* made clear that even if a state has a "substantial economic" interest in collecting "tolls" relating to regulated activity, the issue is whether the government acts in a regulatory or proprietary manner. *Cleveland*, 531 U.S. at 21-22. Stating a principle that is as applicable to border crossings as to patent rights, the Court specifically stated that "[a] right to exclude in [a regulatory] capacity is not one appropriately labeled 'property.'" *Id.* at 24. The Court also included the power to "tax" in identifying typically regulatory functions, along with the power to "permit [and] regulate." *Id.*

The government also cites *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950), which relates to the accrual of interest under the Internal Revenue Code, as support for the proposition that foreign sovereigns necessarily possess the bundle of rights that we regard as "property" beginning the moment a tax is due under their laws. Opp. 31. The govern-

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in disclosures regarding currency transactions. *Id.* at 53-57. The government submitted no proof in this case regarding what, if any, disclosure requirements Canada imposes, much less that any such requirements would create a property interest. Nor did the government prosecute Petitioners for seeking to obtain from Canada any chose in action. Had Petitioners' alleged scheme been completed, it would not have resulted in Petitioners obtaining a cause of action that formerly belonged to Canada. To the contrary, Canada would have retained a claim against them.

ment, however, provides no basis for this spectacular and myopic leap of faith that homogenizes all the world's tax laws into one,[18] demonstrating just how ill equipped the institutions of this country are to resolve issues of foreign tax law.

2. A Government Does Not Necessarily Have A Property Interest In Taxes That Are Legally Due.

The government argues that "money that is legally due" under a foreign sovereign's tax laws is necessarily "money or property" for purposes of the wire fraud statute. This is incorrect. Whether and at what point an uncollected tax becomes "property" under the wire fraud statute, while ultimately a question of federal law, cannot be determined without a close analysis of the law of the jurisdiction that creates the right or interest in the first place, *see, e.g.*, *Cleveland*, 531 U.S. at 21-24. Depending on the laws of the jurisdiction, it is entirely possible for taxes to be due without constituting government property.

For example, in *United States v. Johnston*, 268 U.S. 220 (1925), a boxing promoter failed to pay taxes due on admission fees and was convicted of embezzlement. This Court reversed the embezzlement conviction, noting that "[t]he money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show." *Id.* at 227. The Court viewed the defendant as a "debtor and not a bailee," indicating that the money he held was not government property, even though taxes were due. *Id.* Earlier, in 1910, this Court held that a district court clerk could not be convicted of embezzlement or fraudulent conversion for failing to pay to the government fees collected by

[18] Reliance on *Manning* is also incorrect because the timing of interest payments is a matter of policy, based on administrative criteria and substantive objectives. It no more defines when a property interest exists in an uncollected tax than does a negotiated interest provision in a contract for the purchase of goods or services.

the court, where the statutes relating to fee collection and clerk compensation did not support a finding that the government had a property interest in the fees. *United States v. Mason*, 218 U.S. 517, 519-31 (1910).

No rule exists today that taxes become state property at the moment they are "due." *People v. Nappo*, 94 N.Y.2d 564 (2000), for example, involved larceny charges for failure to pay state taxes on the importation and distribution of motor fuel. The court held that the defendants could not be so charged because "[t]he taxes due were not the property of the State *prior to their remittance*." *Id.* at 566 (emphasis added); *see also State v. Marcotte*, 418 A.2d 1118, 1121-22 (Me. 1980) (defendant could not be charged with theft by misapplication of property for failing to pay state sales tax, when relevant taxing law included no obligation to reserve funds for payment to state); *cf. United States v. Gwin*, 839 F.2d 427, 429-30 (8th Cir. 1988) (reversing conviction under 18 U.S.C. § 641 due to lack of governmental property interest). Foreign tax law is at least as complex and nuanced as our own.

By proposing a single test for determining when a foreign nation acquires a property interest in its taxes, the government creates potential for interference in that nation's affairs. First, as in the above cases, foreign tax law may not create a governmental interest that qualifies as property at the moment the tax comes due. Second, the courts of this country, called upon to interpret another country's tax procedures, could reach rulings inconsistent with those of the foreign country regarding when payment comes due.[19]

[19] These issues of interference cannot be resolved by saying that whether taxes are due can be determined based on whether the foreign government "has required the payment of taxes" and whether "the defendant schemed to fraudulently deprive the foreign government of those taxes." Opp. 33. Merely proving that a tax exists—assuming that is what the government means by the vague term "has required the payment of a tax,"—does not demonstrate that it is due. Moreover, the nature of a defendant's scheme cannot prove the legal issue of when a tax is due. If it

Even if the government's "taxes due" test were correct, which it is not, Petitioners' convictions would require reversal because neither the indictment nor the jury instruction made any reference to whether the tax money at issue was "due," and there was no evidence on this issue at trial.[20]

3. The Alleged Fraud At Issue Here Is Not Punishable By The Wire Fraud Statute.

The government agrees that Canada could not bring a civil fraud claim in this country relating to a tax fraud committed against it. Opp. 12-16. The government nonetheless argues that a criminal wire fraud prosecution is permissible here on such facts because the revenue rule is jurisdictional. Opp. 33-34. This argument is mistaken. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272 (1935) (describing revenue rule decision as on "the merits"). Moreover, it turns the traditional distinction between criminal and civil law on its head, allowing criminal punishment where a more modest sanction would be unallowable.

The government refers to early statutes that punished frauds on the "revenue." Opp. 30. These authorities support Petitioners. Whereas the mail fraud statute applies to frauds relating to "money or property," the statutes to which the government points address conduct designed to "defraud *the revenue*" or to deprive the United States of "lawful duties." *Id.* (citing statutes). Had Congress intended to include tax fraud within the scope of the wire fraud statute, it would have used these terms. Congress did not do so.

Finally, the government argues that the evidence established the element of materiality for fraud. The government, however, fails to point to any affirmative misstatement or any showing that Canadian law requires disclosure.[21]

4. The Wire Fraud Statute's Use In Cases Involving Foreign Sovereigns Is Limited.

Even if the "money or property" and "fraud" elements of the wire fraud statute could be technically satisfied in a prosecution of this kind, there would still remain a question whether the foreign government's interests would be entitled to recognition in courts of this country. The revenue rule is an exception to the general principles of comity regarding recognition of foreign judgments. Those principles include making a judicial determination of whether the foreign government's law is contrary to the public policy of this country. *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). "The reluctance of courts to recognize . . . [foreign penal and revenue] judgments lies principally in unwillingness to accept such judgments without full scrutiny, and at the same time unwillingness to subject such actions of foreign states to scrutiny."

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could, a defendant could be convicted based on a mistaken belief that a tax was due, when his or her conduct was actually lawful. For example, in the case of a tax on foreign liquor, the prosecution might submit evidence that foreign liquor is taxed and that a defendant planned to enter a country without paying taxes. If, however, the tax is due only after a sale of the liquor within the country, then under the doctrine of legal impossibility, there should be no violation. *See, e.g., In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place"); *United States v. McInnis*, 601 F.2d 1319, 1323-24 (5th Cir. 1979) ("it is not an offense to conspire to do an act that, if completed, would not be a crime").

[20] *See* Pet. App. 58a (indicting Petitioners for scheme to defraud Canada "of excise duties and tax revenues *relating to* the importation and sale of liquor"); J.A. 85-91 (instructing jury that guilt required finding that the scheme involved, alternately, "money," "some loss,"and "some financial loss"). This issue is "fairly included" in the question presented, Sup. Ct. R. 14.1(a), which refers to taxes "potentially owed to a foreign sovereign," not taxes that are due. *See also* Pet. 3 (pointing to lack of proof on point).

[21] The government's failure to prove a materially misleading statement is "fairly included" in the question presented, Sup. Ct. R. 14.1(a), which references an "*alleged* fraudulent scheme," indicating that Petitioners would contest the adequacy of proof, including on this element.

Restatement § 443, Reporters' Note 10. Were we to incorporate the norms of foreign tax law into U.S. criminal law through the wire fraud statute, traditional principles of comity, developed in connection with the recognition of other foreign laws and judgments, would necessarily come into play.

The government would incorporate foreign tax norms into U.S. criminal law, but at the same time eliminate this Court's authority to review the foreign law to ensure that it does not violate public policy, except in cases where the prosecution violates the U.S. Constitution. Opp. 23-25, 33. Thus, under the government's view, even though poll taxes are clearly contrary to U.S. public policy, as demonstrated by the Voting Rights Act, 42 U.S.C. § 1973h, numerous state law provisions, and the Twenty-Fourth Amendment to the U.S. Constitution, which forbids the collection of poll taxes in connection with federal elections, U.S. courts would be required to adjudicate wire fraud prosecutions based on evasion of a foreign poll tax because the U.S. Constitution does not prohibit a foreign government from charging a poll tax in its own elections.

This dwarfed judicial role is contrary to historical precedent. International comity is part of the law of the United States, and, at least in the absence of contrary direction from Congress, this Court has constitutional authority to resolve questions relating to such issues. *Hilton*, 159 U.S. at 162; U.S. Const. Art. III; *cf. Johnson v. Browne*, 205 U.S. 309 (1907) (enforcing Canada's treaty interpretation over U.S. objection).[22]

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[22] By way of comparison, in the context of the judicially created act of state doctrine, which, like the revenue rule is also based on principles of comity, Congress has, in narrow circumstances, dictated that a presidential determination regarding application of the act of state doctrine shall be controlling. *See* 22 U.S.C. § 2370(e)(2) ("Second Hickenlooper Amendment"). This Court has never resolved whether it is obliged to defer to a determination of the President under those narrow circumstances. This Court has consistently *rejected* the notion that U.S. courts are obliged to defer to the Executive's view on whether the act of state doctrine should apply in circumstances in which Congress has not expressly so directed. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772-73 (1972) (Douglas, J., concurring); *id.* at 773-76 (Powell, J., concurring); *id.* at 776-78 (Brennan, J., dissenting); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 715 (1976) (Powell, J., concurring); *id.* at 724-25 (Marshall, J., dissenting); *cf. id.* at 715 (Stephens, J., concurring).

Like the act of state doctrine, in the absence of a statute or treaty on point, the determination of whether comity requires the recognition of a foreign judgment or law is a judicial act, and the Executive does not in such cases have power to negate this judicial role. Thus, the government is wrong when it asserts that in a wire fraud prosecution based upon the failure to pay taxes to a foreign sovereign, separation-of-powers and institutional competence concerns are eliminated by the Executive's choice of when to prosecute. This is especially true when the Legislative Branch, in both the U.S. tax treaty with Canada and the statute that specifically governs the smuggling of goods into foreign countries, has manifested its intent that the courts of this country will *not* become involved in the enforcement of foreign revenue laws in the circumstances present here. *See* 18 U.S.C. § 546; A Revised Protocol Amending the 1980 Tax Convention with Canada, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 (1995). Executive action contrary to these provisions is void. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

"Congress legislates against the backdrop of the presumption against extraterritoriality." *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).[23] This is especially true when criminal liability is at stake. "[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication." Restatement § 403, Comment f. In addition, as a matter of statutory construction, courts presume that

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[23] *See also, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Foley Brothers v. Filardo*, 336 U.S. 281, 286 (1949). This prosecution clearly gives the wire fraud statute extraterritorial effect in that "[t]he actions in [Canada] are . . . most naturally understood as the kernel of" Petitioners' alleged fraud. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2748 (2004).

Congress seeks to follow customary international law by not enacting laws that could create unreasonable interference with the sovereign authority of other nations. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).[24]

Here, both principles are violated in that invoking the wire fraud statute based upon an alleged fraud directed at Canada and taking place in Canada gives that statute extraterritorial effect and interferes with Canada's own ability to regulate within its borders. No express statement by Congress authorizes this use of the statute.[25]

Wire fraud prosecutions of this type interfere with foreign sovereignty in several ways. In addition to the danger of misapplying foreign law, application of the wire fraud statute creates the potential for imposition of different remedies and punishments, which can create unreasonable interference. *Id.* at 2368. Canada may forgo criminal prosecution for violation of its customs laws under certain circumstances, such as if the violator provides restitution or provides cooperation to the government. A defendant may be unwilling to reach an

[24] Although the government points out that the statute uses the term, "any scheme," and argues that "any" is all-inclusive, Opp. 9-10 (citing *United States v. Gonzalez*, 520 U.S. 1, 5 (1997)), the government admits that the term "any" does not provide a clear statement abrogating the revenue rule. Opp. 19-21 (discussing restitution provision applicable to "any offense committed by fraud or deceit"). *Gonzalez* does not hold that the use of the term "any" gives a statute extraterritorial effect. *Id.* at 5. In contrast, this Court has held that the term "any criminal case" in the Self-Incrimination Clause does not include foreign criminal cases. *United States v. Balsys*, 524 U.S. 666, 672-74 (1998). The cases the government cites in which a wire fraud victim was a foreign public entity all involved the governments acting in a proprietary, not sovereign, capacity. Opp. 10.

[25] The statute's reference to wire transmissions in "foreign commerce" does not indicate a legislative intent to provide for the extraterritorial application of the statute. *See Arabian American Oil Co.*, 499 U.S. at 251; *McCulloch*, 372 U.S. at 15 n.3 and 19.

agreement with Canadian authorities knowing that the United States could prosecute for wire fraud.

Such interference is unreasonable under the analysis of *F. Hoffman-La Roche*, 124 S. Ct. at 2367, and Restatement § 403(2), which it cites. The regulation is inconsistent with traditions of the international system. Canada has a high interest in regulating, and there is a significant likelihood of conflict regarding interpretations of its tax laws and extent of punishment. Further, such prosecutions defy justified expectations in that U.S. citizens would not generally expect to be subject to U.S. criminal prosecution based on foreign revenue offenses. This is especially true here because the prosecution in this case is inconsistent with more specific authorities on point. *See supra* 17 n.22.[26] There has been and is no substantial, direct, or foreseeable harm to this country. Indeed, the alleged use of U.S. wires here is merely jurisdictional. Ample other enforcement means are available, including extradition and Canadian prosecution.

The parade of horribles the government hypothesizes has no factual connection whatsoever to this case. Opp. 23. The notion that the revenue rule will render the government unable to obtain convictions of persons involved in "international criminal organizations" that serve as a "training

[26] The government argues that it has discretion whether to prosecute under the wire fraud statute or the anti-smuggling statute, 18 U.S.C. § 546, and cites cases in which two or more statutes provide for punishment of the same conduct. Opp. 35-36. The relevance of Section 546, however, is not that it provides for a lesser punishment than wire fraud (although it does); rather, Section 546 is relevant because Petitioners' conduct is not covered by that more specific statute at all, because Congress intended to require reciprocation from the foreign country in order for smuggling into a foreign country to be criminal in this country in the first place. This is the clear statement of Congressional purpose *against prosecution* in these circumstances, and neither the wire fraud statute nor any other statute provides a comparably clear statement in favor of prosecution.

ground" for "operations that are later launched against domestic victims" is hyperbolic at best. The government did not begin prosecutions of this type until the 1990s, although the mail fraud statute had been in place for a century. The government retains an arsenal of weapons that it can employ against those who pose serious domestic threats. In the wake of September 11, Congress has hardly been shy about providing the Executive with additional authority to prosecute a broader array of financial crimes. But Congress has not expressed any intention—much less a clear intention—to allow prosecutions of the type at issue here. The government's request to have the shackles of the revenue rule removed from its wrists is best addressed to the body that enacted the wire fraud statue in the first place: Congress.[27]

CONCLUSION

The judgment of the court of appeals should be reversed and Petitioners' convictions and sentences vacated.

Respectfully submitted,

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[27] Petitioners argued below that the district court's amount of loss determination violated the Sixth Amendment. *See* J.A. 95, 98. Petitioners have consistently maintained that their sentences could not properly be based on a purported revenue loss to Canada, and the jury never determined what the relevant amount would be. If this Court were to find against Petitioners regarding the arguments raised above, the Court should still remand in light of *Blakely v. Washington*, 124 S. Ct. 2531 (2004).